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In the
SUPREME COURT OF THE UNITED STATES

Lorillard Tobacco Co., et al.,
Petitioners,

v.

Thomas F. Reilly,
Attorney General of Massachusetts,
Respondent.

Ataladis U.S.A. Inc., et al.,
Petitioners,

v.

Thomas F. Reilly,
Attorney General of Massachusetts,
Respondent.

On Writ of Certiori to the United States
Court of Appeals for the First Circuit

BRIEF *AMICUS CURIAE* TOBACCO CONTROL RESOURCE CENTER, INC. IN SUPPORT OF RESPONEDENT

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INTEREST OF AMICUS CURIAE

Letters from the parties granting consent for this brief have been filed with the Clerk of this Court.

The interest of the Tobacco Control Resource Center ("TCRC") in this case arises from its mission to improve public health by reducing the use of and exposure to tobacco products and smoke in the United States and internationally. Begun in 1979 and a 501(c)(3) nonprofit since 1984, the TCRC has experience in tobacco control issues generally, as well as longstanding and specific expertise in the legal and policy issues relating to tobacco control and public health. The TCRC attorneys provide tobacco control analysis and education for federal and state regulatory bodies, federal and state representatives, municipalities, boards of health, non-governmental organizations, and litigators involved in tobacco products liability.

Professor Richard A. Daynard, of the TCRC, filed an *amicus* brief in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), co-representing six former United States Surgeons General, the American Council for Science and Health, and the Tobacco Products Liability Project. The TCRC has also filed an *amicus* brief in the Supreme Judicial Court of Massachusetts in *Tri-Nel Management Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 741 N.E.2d 37 (2001) (upholding board of health authority to regulate smoking in public places).

The TCRC can assist the Court in its analysis of the regulatory provisions at issue here featured in Massachusetts Regulations Title 940, Chapters 22.00; 22.00. In August of 1999, the Robert Wood Johnson Foundation awarded the TCRC a grant entitled "Cigar Regulation and Other Legal Interventions to Reduce Cigar Use," which has funded law review articles describing the marketing and sales practices common to cigar retail.[1] This brief focuses on the cigar-related regulatory provisions at issue.

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[1] This grant has funded the writing of this brief *amicus curiae* as well. *See Grant No. 037857,* Robert Wood Johnson Foundation, Substance Abuse Policy Research Program, Dept. of Pub. Health and Sciences, Wake Forest Univ. School of Medicine.

SUMMARY OF ARGUMENT

An investigation by the Massachusetts Department of Public Health has revealed that cigarette advertisements occur with alarming frequency near elementary and middle schools, evincing a scheme designed to entice youth to illegally obtain cigarettes. The Centers for Disease Control and Prevention ("CDC") have also found that cigars are the second most popular tobacco product after cigarettes among underage users. The Commonwealth's response to these investigations was to include cigars in its effort to combat illegal sales of tobacco products. This brief outlines the current data around cigar marketing and sales, which support inclusion of cigars in the Commonwealth's consumer protection regulations.

The advertising and sales practices for cigars by retailers now largely mimic those for other tobacco products, including cigarettes. Studies by a major Massachusetts municipality and by the Federal Trade Commission ("FTC") show that up to 11% of all tobacco advertising at general-use retail stores is dedicated to cigars and that leading cigar companies supported this form of advertising through generous promotional allowances and creating point-of-sale advertisements. The unchecked access to tobacco products through "self-service displays" is also common to the retail sales of cigars.

Restricting access to cigars will not impede lawful communication. Instead, cigars may be displayed in any retail establishment, if physical access to cigars or the area where cigars are displayed is restricted to adults. Additionally, the Massachusetts Attorney General's regulations allow cigars to be displayed in a manner that allows adult patrons access to hold, smell, and otherwise inspect cigars under controlled circumstances.

The United States Supreme Court has signaled that it may review and revise the intermediate level of scrutiny that it gives to certain commercial speech restrictions as set forth in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 328 (1980). The Massachusetts Attorney General's regulations should survive judicial scrutiny under either the intermediate scrutiny test set forth in *Central Hudson* or stricter scrutiny as applied to commercial speech, such as those suggested in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

In the instant case, the Attorney General's regulations are not a prohibition as they allow numerous alternative channels of communication in mass media and in stores, and thus should be subject to an intermediate level of scrutiny. Moreover, the Attorney General's regulations are in furtherance of a substantial government interest in commercial matters, namely, "the preservation of a fair bargaining process." In furtherance of this interest, the Attorney General's regulations attempt to prevent the sale of tobacco products to minors through the use of enticing, aggressive advertising placed near schools that constitutes unfair or deceptive marketing practice under Massachusetts' consumer protection law. The Attorney General's regulation is in support of a government interest in commercial speech and should be examined using intermediate scrutiny, as set forth in *Central Hudson*, which directs courts to uphold regulations that directly and materially advance the government's substantial interest in preserving a fair bargaining process. In this case, that involves preventing minors from becoming involved in illegal commercial transactions for purchasing cigars. The regulations reasonably only seek limitations where children are most likely to be affected -- in the schoolyards, playgrounds, and stores that they frequent.

Should the Court decide to revise the *Central Hudson* test, the regulations at issue also would pass muster using the extremely stringent commercial speech test that would only permit regulation of commercial speech if the underlying commercial transaction has been prohibited. In Massachusetts it is illegal to sell tobacco products to a minor. The Attorney General's regulations are narrowly-tailored only to limit commercial speech where children are most likely to frequently see it. Where the act is prohibited, government regulation of commercial speech promoting the act should be reviewed at no more than an intermediate level of scrutiny.

ARGUMENT

Massachusetts Regulations Title 940, Sections 22.06(5)(a)&(b) and 22.06(2)(c)&(d) directly target sales and distribution of cigars to children made illegal by Massachusetts General Law Chapter 270, Section 6 without prohibiting lawful communication to adults. The current data on cigar marketing and sales practices warrants the restrictions featured in these consumer protection regulations.

I. CHILDREN UNDER THE AGE OF 18 YEARS ARE EXPOSED TO A HIGH LEVEL OF ILLEGAL DISTRIBUTION OF CIGARS

Despite the Commonwealth's efforts and successes to enforce its law setting a minimum age for cigar sales, Mass. Gen. Laws chapter 270, §6; *see also* discussion, *infra*, part II.B, high rates of underage cigar use show that the illegal retail distribution of cigars remains alarmingly high. High youth cigar smoking rates were first reported in 1996, when 14.5% of high school students in Massachusetts reported having smoked a cigar during the previous month. CDC, *Cigar Smoking Among Teenagers -- United States, Massachusetts, and New York, 1996*, 46(20) Morbidity and Mortality Weekly Report ("MMWR") 433, 432 (May 23, 1997) *republished at* <http://www.cdc.gov/tobacco/research_data/mmwr4620.htm#first> (visited on March 21, 2001). In 1998, a study revealed that monthly cigar use among the same age group reached 22%. CDC, *Tobacco Use Among High School Students -- United States, 1997*, 47(12) MMWR 229, (April 3, 1998) *republished at* <http://www.cdc.gov/mmwr/PDF/wk/mm4712.pdf> (visited on March 21, 2001). In October of 2000, the CDC reported that 15.4% of middle school students and 41.6% of high school students tried cigar smoking, and that 6.1% of middle school students and 15.3% of high schools students regularly smoke cigars, making cigars the second most popular tobacco product after cigarettes. CDC, *Youth Surveillance United States 1998-1999*, 49 MMWR (Oct. 13, 2000) at 5. *republished at* <http://www.cdc.gov/tobacco/research_data/youth/ss4910.pdf> (visited on March 21, 2001) [hereinafter CDC 2000 Youth Report].

In its initial version of its "Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect

Children and Adolescents," the FDA included "little cigars." 61 Fed. Reg. 44396 (1996). While confusion with federal tax laws and a lack of empirical evidence ultimately dissuaded the FDA from including "little cigars" in its final version of the regulations, *see id.* at 44424, the current evidence, all of which has surfaced since the FDA decided to exclude little cigars, now justifies including cigars in the Commonwealth's regulations targeting illegal distribution of cigars to children.

II. MASSACHUSETTS REGULATIONS TITLE 940, SECTIONS 22.06(5)(a)&(b) AND 22.06(2)(c)&(d) TARGET THE DISTRIBUTION OF CIGARS TO CHILDREN MADE ILLEGAL BY MASSACHSUETTS GENERAL LAW CHAPTER 270, SECTION 6

After a statewide study revealed that retailers display tobacco advertisements at one-and-one-half times greater frequency near elementary and middle schools than elsewhere, evincing a marketing scheme designed to entice minors to obtain cigarettes in violation of the minimum age law, *Massachusetts Operation Storefront 1998,* Mass Dept. of Public Health (1998) *republished at* <http://www.state.ma.us/dph/mtcp/report/osrep.htm> (visited on March 21, 2001) [hereinafter Operation Storefront], the Massachusetts Attorney General sought a remedy to protect children from the illegal sales and distribution of tobacco products. The solution came in the form of regulations expressly designed to "prevent access to [tobacco products] by underage consumers," Mass. Regs. Code tit. 940, chs. 21.00; 22.00, and largely modeled on the now defunct FDA tobacco-related regulations. *See Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

The regulatory provisions challenged by the cigar petitioners feature three requirements: 1) outdoor cigar advertisements must be at least 1,000 feet away from elementary schools and certain other areas frequented by children, *see* Mass. Regs. Code tit. 940, § 22.06(5)(a); 2) indoor cigar advertisements within these areas may not extend below five feet from the floor of any part of a retail establishment open to the general public, *see id.* at § 22.06(5)(b); and 3) retailers may not allow unchecked access to cigars, s*ee id.* at § 22.06(2)(c) & (d).

A. Many General-Use Retail Stores in Massachusetts Display Cigar Advertisements, Warranting State Consumer Protection to Target the Encouragement of Illegal Retail Distribution of Cigars to Children

Massachusetts Regulation Title 940, Sections 22.06(5)(a)&(b) target illegal sales and distribution of cigars to children by limiting the ability of cigar companies to lure children to attempt to obtain cigars. While the link between recent increases in cigar use and advertising is widely suspected in the public protection community, *see* Frank Baker PhD, et al., *Health Risks Associated with Cigar Smoking*, 6 JAMA 655, 735 (Aug. 9 2000), a brief examination of cigar marketing clarifies the acute need recognized by the Massachusetts Attorney General to include cigars in his regulations designed to increase compliance with Massachusetts General Law Chapter 270, Section 6.

The resurgence of cigars began with the practice of manipulating news and entertainment media. Internal documents unearthed by the Baltimore Sun Newspaper show that this industry-level scheme was hatched in the early 1980s with the formation of a trade association called the Cigar Association of America Inc. *See* Alec Klein, *The Cigar Caper*, The Baltimore Sun, Jan. 11, 1998, at 1A. The Association decided that "the consumer of the '80s may harbor built-in skepticism when he reads an advertisement in a magazine or sees a commercial on TV[, but] he accepts and believes the public relations message [of the cigar industry] because it reaches him in the form of news and information." *Id.*

This manipulation of entertainment media has continued into the 1990s. Most recently, it was revealed that members of the cigar industry used product placement firms to insert their products into large budget films such as the First Wives Club, Golden Eye, She's the One, and most notably the film Independence Day, which reached more than 60 million people. *See* Alec Klein, *The Cigar Caper,* The Baltimore Sun, Jan. 12, 1998, at 1A. Members of the cigar industry similarly inserted their products into primetime television shows on national networks, such as Third Rock From the Sun, Cosby, Mad About You, Suddenly Susan, and Murphy Brown. *See id.*

The promotion of cigars, however, has now matured to include advertising in general-use retail stores, bringing it within the marketing techniques that the Massachusetts Attorney General concluded would increase the illegal distribution of tobacco products to children. A 1999 study that examined the presence of outdoor and indoor cigar advertising in Worcester, Massachusetts revealed that 11% of tobacco advertising at general-use retail stores is devoted to cigars. Joseph R. DiFranza, et al. *A Comparison of the Advertising of Accessibility of Cigars, Cigarettes, Chewing Tobacco, and Loose Tobacco*, 29 Preventive Medicine 321, 323 (1999) [hereinafter DiFranza]. The study's authors compared their findings to those of a similar study conducted in 1987, and stated "that there may have been a substantial increase in point-of-purchase advertising for cigars" at general-use retail stores. *Id.*

The Worcester study's findings are explained by the increase in the amount of money that cigar companies give to retailers. Traditionally, tobacco manufacturers compete for advertising space in retail stores with generous promotional allowances. *See id.* at 324. In its 1999 Cigar Report to Congress, the FTC concluded that the cigar industry has recently increased spending on such promotional allowances to comprise 40% of the industry's product promotion budget in 1997. FTC, *Report to Congress: Cigar Sales and Advertising and Promotional Expenditures for Calendar Years 1996 and 1997*, at 4 (1999) *republished at* <http://www.ftc.gov/os/1999/9907/cigarreport1999.htr> (visited on May 8, 2000); *see also* 1999 WL 514267 [hereinafter FTC 1999 Cigar Report]. Combined with the amount spent on the actual point-of-sale advertisements, the cigar industry sent approximately 52.7% of its product promotion budget to retailers during the FTC's investigation. *Id.* The obvious control exerted through promotional allowances shows that the leading cigar companies are responsible for the increase in cigar advertising in general-use retail stores in Massachusetts.

The leading cigar companies have chosen to control retailers in a manner similar to the method used by cigarette manufacturers. Both industries devoted around 40% of their product promotion budgets to "promotional allowances" during the FTC's recent investigations. *See* FTC, 2001 Report to Congress: Cigarette Report For 1999, at 16 (2001) *republished at* <http://www.ftc.gov/reports/cigarettes/1999

cigarettereport.pdf> (visited on March 19, 2001) [hereinafter 2001 FTC Cigarette Report]. The cigar companies have spent more aggressively on point-of-sale advertisements, devoting 12.7% of their advertising budget on this category as opposed to the cigarette industry's 5.4% in 1997. *Compare id &* FTC 1999 Cigar Report at 4. While the several-billion dollars that the cigarette industry spends on product promotion by retailers dwarfs that spent by the cigar industry, both industries aggressively encourage advertising of their products by retailers. *See id.*

Because the cigar and cigarette industries similarly encourage retailers to advertise their products, consistent regulation is prudent. The Massachusetts Regulation Sections 22.06(5)(a)&(b) would reduce the illegal distribution of cigars to children by preventing cigar companies from luring children to obtain cigars on their way to and from school and in general-use retail stores where they shop.

B. Massachusetts Regulation Title 940, Sections 22.06(5)(a)&(b) Are Integral to the Massachusetts Tobacco Control Program's Overall Effort to Reduce Illegal Distribution of Cigars to Children

In its 2000 analysis of proposed consent orders to end certain deceptive practices carried on by leading cigar companies,[2] the FTC explicitly recognized the acute need of state consumer protection regulation for cigar advertising, stating:

> [T]he Commission recognizes *the critically important role that states play in consumer protection and tobacco control.* The [health warning] provision does not affect other state or local requirements. For example, required warnings for types of advertising that are not covered by

[2] *See In the Matters of* Swisher International, Inc. (Matter No. 002-3199); Consolidated Cigar Corporation (Matter No. 002-3200); Havatampa, Inc. (Matter No. 002-3204); General Cigar Holdings, Inc. (Matter No. 002-3202); John Middleton, Inc. (Matter No. 002-32-05); Lane Limited (Matter No. 002-3203); and Swedish Match North America, Inc. (Matter No. 002-3201) *respectively at* 1 (June 2000). *See* <http://wwwftc.gov.os/2000/06/index> (visited at March 21, 2001).

> the proposed orders (such as shelf talkers under a certain size), or *state or local restrictions on the advertising placement or youth access to tobacco products are not affected.*

65 Fed. Reg. 41998, 42000 (2000) (emphasis added). The "critically important role" for state consumer protection regarding advertising placement includes reducing the illegal sale and distribution of cigars to children.

Indeed, the Surgeon General of the United States concurs that states should restrict advertising placement to reduce illegal distribution of all tobacco products to children. *See* David Satcher, MD, PhD, *Reducing Tobacco Use: A Report of the Surgeon General*, Dept. of Health and Human Services, at 375 (2000) [hereinafter 2000 Surgeon General Report]. The Surgeon General recognizes four essential components of a state program that has a goal of "preventing initiation [(and by extension distribution of tobacco products)] among young people." *Id.* In his list, the Surgeon General includes "reducing protobacco messages." The Surgeon General warned that "a major econometric marketing study found that young people are three times more affected by [tobacco] advertising than are adults," and that "34% of all youth experimentation with smoking in California between 1993 and 1996 can be attributed to tobacco promotional activities." *Id.* at 410.

Massachusetts' tobacco control program already has three of the Surgeon General's four components in place for cigars and other tobacco product. The first component, "decreasing young people's access to tobacco products," *id* at 410, is substantially achieved through municipal level licensing regulations, ordinances and by-laws, although current rates of cigar use suggest more regulatory protection is needed, *see* discussion, *infra*, part II. The Commonwealth's tobacco control program has successfully facilitated licensing of tobacco retailers in approximately 230 of the 351 municipalities in Massachusetts as of July 2000. *See* Massachusetts Municipal Association Tobacco Regulation Maps *republished at* <http://www.mahb.org/tobacco/massmaps/tobpermit.htm> (visited on March 21, 2001). The licensing schemes in these municipalities commonly require retailers that sell tobacco to educate their employees about state and local tobacco control laws and to consent to unannounced compliance checks. *See, gen.*,

Massachusetts Association of Boards of Health Model Youth Access Regulations, *republished at* <http://www.mahb.org/bohregs/bohregsframe.htm> (visited on March 21, 2001). The permitting schemes also institute a fine structure that often establishes civil penalties ranging in the hundreds of dollars for the recurrent failure to check a minor's age before selling her a tobacco product. *Id.* Suspension of permits to sell tobacco is used in extreme cases. *Id.* Through the establishment of permitting regulations and controlled buying attempts by youth under the age of 18 -- 31,603 attempts as of 1998 -- the Commonwealth has significantly reduced youth access to all tobacco products. *See* William L Hamilton & Giulia diStefano Norton, *Independent Evaluation of the Massachusetts Tobacco Control Program,* Abt Associates, Inc., 49-50 (1999) [hereinafter Hamilton Report].

The second component, "increasing prohealth messages," 2000 Surgeon General Report, *supra*, at 374, has been undertaken in the form of massive youth education campaigns to reduce underage use of all tobacco products. Hamilton Report, *supra*, at 42. In fiscal year 1998, Massachusetts schools received $21 million for tobacco education. *Id.* at 45. Additionally, in 1998, the Department of Public Health sponsored or participated in almost 900 events outside of schools drawing about 160,000 attendees, *id.* at 45, and purchased $11.21 million in mass media counter-advertising, *id.* at 7.

The United States Surgeon General's third component of a comprehensive state regulatory scheme to reduce underage tobacco use is "increasing the price of tobacco products." 2000 Surgeon General Report, *supra*, at 374. Massachusetts increases the price of cigars by charging an excise tax. Mass. Gen. Laws. ch. 64C, § 7B.

Massachusetts Regulation Title 940, Sections 22.06(5)(a)&(b) fulfills the Surgeon General's fourth component of "reducing the protobacco message" without prohibiting information about tobacco products to adults. *See* 2000 Surgeon General Report, *supra*, at 374. In concert, the Surgeon General's components of a comprehensive plan to prevent tobacco use by children would serve to reduce the illegal distribution of cigars to children. An incomplete application of the Surgeon General's comprehensive plan would allow an unacceptable level of noncompliance with the Commonwealth's minimum age tobacco sales law.

C. Many General-Use Retail Stores in Massachusetts Allow Unchecked Access to Cigars, Warranting the Limited Restriction on Self-Service to Cigars Pursuant to Massachusetts Regulation Title 940, Sections 22.06(2)(c)&(d)

In his 2000 Report on tobacco use, the United States Surgeon General recognized that controlling access to tobacco products is integral to reducing distribution of tobacco to youth. 2000 Surgeon General's Report, *supra*, at 207-23. Self-service to tobacco products in general-use retail stores has been associated with greater access (albeit by shoplifting) to cigarettes, especially among children. Marianne B. Wildey, et al., *Self-Service Sale of Tobacco: How It Contributes to Youth Access*, 4 Tobacco Control: An Int'l Journal, 327, 355 (Winter 1995) [hereinafter Wildey]. Massachusetts Regulation Title 940, Sections 22.06(2)(c)&(d) would reduce this form of youth access to cigars by simply requiring retailers to verify their customers' age before they are allowed to physically handle cigars or packages of cigars.

At first glance, unchecked access to any tobacco product seems self-defeating for retailers, given that they report a strong correlation between self-service to cigarettes and revenue loss due to shoplifting of cigarettes. Wildey, *supra*. A New York study completed in the early 1990s found that 44% of 14 to 15 year-old children admitted to stealing cigarettes. *id.* In 1999, the CDC found that nationally 11.4% of middle school age children regularly obtained cigarettes by theft. CDC 2000 Youth Report, *supra*, at 21.

The promotional allowances distributed to cigarette retailers, however, compensates a retailer for his loss. *See* Wildey, *supra*, at 359-60. Under this technique, a retailer of cigarettes makes money facilitating elevated levels of cigarette theft by allowing unchecked access to tobacco products up to the moment of payment. *See id.* In 1994, retailers lost an average of $1,200 annually from theft of cigarettes, and at the same time received about a $1,500 promotional allowance from cigarette manufactures. *Id.* From 1994 to 1998, cigarette manufacturers have since increased their promotional allowance budget by several-billion dollars to comprise over 42% of its product promotion budget, which indicates that providing unchecked access to cigarettes prior to payment is even more profitable now. *See* 2001 FTC Cigarette Report, *supra*, at 14-16.

The FTC's 1999 Cigar Report indicates that similar arrangements exist between the leading cigar companies and retailers that sell cigars. The FTC's Report shows that the cigar industry devoted 40% of its promotional expenditures to promotional allowances for cigar retailers. *See* FTC 1999 Cigar Report, *supra*, at 4. Such expenditures explain recent findings, which show that 16.8% of the general-use retail stores in Massachusetts displayed cigars and cigar packages in a manner that allowed any person to take the product without assistance from a store clerk. DiFranza, *supra*, at 324 (also noting that this percentage excludes vending machines or establishments exclusively devoted to cigar sales).

As with cigarettes, the promotional allowances given by the leading cigar companies that increase the unchecked retail access to cigars also probably facilitate youth access. In 1999, 12.8% of middle school age youth and 4.8% of high school age youth regularly obtained cigars by theft. CDC 2000 Youth Report, *supra*, at 23. These factors are undoubtedly well known to cigar companies.

The restriction on self-access to cigars under Massachusetts Regulation Sections 22.06(2)(c)&(d) should not be the subject of a First Amendment analysis. This regulation preserves a retailer's ability to display cigars and cigar packaging to the public. Under the restriction, retailers could legally display products behind glass or clear plastic, display products behind the clerk's counter, display products in a locked humidor, display products in a closed kiosk anywhere in a store, and countless other methods of display. Additionally, under the regulations, cigars may be displayed in a manner that allows patrons to hold, smell, and otherwise inspect any tobacco product without assistance from store personnel if entrance to the facility is restricted to adults. *See* Chapter 22.06(4)(c). Such an adult-only facility arguably could comprise an enclosed area or part of any "retail outlet" that is open to the general public described in Sections 22.02(2)(c)&(d).

III. THE ATTORNEY GENERAL'S REGULATIONS ARE CONSISTENT WITH FIRST AMENDMENT VALUES UNDER A STRICTER COMMERCIAL SPEECH TEST AS SUGGESTED IN *44 LIQUORMART* BECAUSE A PARTIAL SPEECH REGULATION BASED ON A COMMERCIAL GOVERNMENT INTEREST SURVIVES WITH OR WITHOUT *CENTRAL HUDSON*

The Attorney General's regulations survive a more rigorous examination under new approaches to judicial scrutiny of commercial speech regulations. In the event that the Court applies a standard limiting commercial speech regulations to partial restrictions in furtherance of the government's interest in commercial protection of its citizens, the regulations at issue would be constitutional.

The Supreme Court has indicated that it may reexamine the current commercial speech analysis used to determine if a government regulation of commercial speech is constitutionally sound. *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996). Under the current *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n* test, commercial speech receives an intermediate level of scrutiny. 447 U.S. 328 (1980). In *44 Liquormart*, by contrast, the Justices employed several approaches to determine that Rhode Island had abridged the liquor retailers' free speech. Justice Stevens' plurality opinion set out a modified *Central Hudson* approach where an intermediate level of scrutiny would still be employed to examine speech restrictions intended "to protect consumers from misleading, deceptive or aggressive sales practices." *44 Liquormart*, 517 U.S. at 501. A strict level of scrutiny would be employed if the government "entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process." *Id.* at 499. Justice Thomas stated that an absolute prohibition should be *per se* unconstitutional because it is paternalistic, *Id.* at 519 (Thomas, J. concurring in part) while Justice O'Connor saw no need to reexamine the *Central Hudson* test because the Rhode Island statute did not even pass that test. *Id.* at 528 (O'Connor, J. concurring). In addition, Justice Thomas proposed abandoning *Central Hudson* and

returning to an analysis set out in an earlier commercial speech case, *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S.748 (1976), that preventing *legal* choices by citizens by keeping them ignorant is unacceptable. *Id.* at 526 (Thomas, J. concurring).

A. The Regulation is Not an Absolute Prohibition and Therefore Should Receive an Intermediate Level of Judicial Scrutiny

The regulation at issue is not a prohibition because it allows the dissemination of truthful, non-misleading information about the product. The government cannot restrict an activity it does not approve of by banning the speech related to or advertising that activity. *See 44 Liquormart*, 517 U.S. at 501; *see also Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 426 (1993); *Central Hudson*, 447 U.S. at 566. In *44 Liquormart*, the government placed total bans on speech to limit adults' access to information for a lawful product in a fashion that made it practically impossible for adults to receive the information anywhere within the state's boundaries. *44 Liquormart*, 517 U.S. at 504. Here, by contrast, the Attorney General has limited the regulation to a geographic area where children are most likely to be present. Mass. Regs. Code tit. 940, § 22.06(5). Additionally, there are many alternative sources for adults to gain access to this information including newspapers, magazines, and inside the stores themselves and therefore the Court of Appeals correctly found "the restrictions are not equivalent to a blanket ban on speech." *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 52-3 (1st Cir. 2000).

The industry can continue to advertise in all the same media as before except for storefronts near schools and playgrounds. *Id.* at 52 (interpreting Mass. Code Regs. tit. 940, § 22.06(5). In stores within the zone of the regulation, cigars may still be advertised within the store above 5 feet from the ground to lessen the likelihood of children being influenced by them. Mass. Code Regs. § 22.06(5)(b). For this reason, the Court's concerns regarding a prohibition on speech directed at adults are not implicated by a lesser restriction. *See 44 Liquormart*, 517 U.S. at 501 (plurality), 519-20 (Thomas, J. concurring). As the regulation leaves open many alternative geographic and media channels of communication, it is not a

complete prohibition on speech and should be analyzed under an intermediate level of scrutiny.

B. The Regulation Furthers a Substantial Government Interest in Commercial Matters and Therefore is Subject to an Intermediate Level of Judicial Scrutiny

The Commonwealth's regulations would pass constitutional muster under the plurality's analysis in *44 Liquormart,* stating that limitations on speech that are aimed at achieving a commercial government purpose receive intermediate scrutiny. The case law striking down statutes, restricting commercial speech consistently identifies as a flaw in the statutes that the government interest did not relate to consumer protection, within a commercial speech context. *See 44 Liquormart*, 517 U.S. at 491 (government interest was to promote temperance); *Carey v. Population Services Int'l*, 431 U.S. 678, 701 (1977) (government interest was to limit access to contraceptive counseling services).

The goal of the instant regulation is related to "the preservation of a fair bargaining process," and thus implicates commercial speech concerns. *See 44 Liquormart*, 517 U.S. at 501; Mass. Code Regs. tit. 940, § 22.06(5)(a). Targeting minors with advertisements meant to entice them to purchase products that are illegal to sell to minors is *per se* "unfair or deceptive acts or practices" and hence prohibited under Massachusetts law. Mass. Regs. Code tit. 940, §§ 21.04(5); 22.06(5); *cf. Mangini v. R. J. Reynolds Tobacco Co.*, 20 Cal. Rptr. 2d 232 (Cal. App. 1st 1993), *aff'd* 875 P.2d 73 (Cal. 1994) (noting that California law holds that it is *per se* unfair to entice minors to purchase tobacco products where it would involve a minor in an illegal transaction).

Under Justice Stevens' approach in *44 Liquormart*, an intermediate scrutiny analysis is still valid where there is a government interest in commercial matters and should still be employed to prevent aggressive sales practices, such as marketing a dangerous addictive drug to minors, particularly where state law prohibits sales to minors. 517 U.S. at 501. The Court has upheld speech restrictions limiting the aggressive sales practices of in-person attorney solicitations, *see Florida Bar v. Went-For-It, Inc.*, 115 S. Ct. 2371 (1995), and direct mail by attorneys targeting injured

parties or their survivors, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978). The Attorney General is seeking to regulate the more aggressive sales practice of purposefully luring minors into using an addictive product with expensive, well-researched advertising campaigns. This aggressive sales practice is evidenced by the higher concentration of tobacco advertising on retail store windows the closer one draws to a school. *See* Operation Storefront, *supra.* "Storefronts located within 1000 feet of a school were significantly more likely to display tobacco advertisements, and displayed more tobacco advertisements per vendor than did vendors farther away from schools." *Id.* at 11. The increased number of tobacco advertisements near schools "expos[ed] children to nearly one and a half times more tobacco displays during their daily activities." *Id.* The repeated observation of this phenomenon belies any claim that it is a coincidence.

Unfair competition is also a substantial state interest for regulating tobacco advertising without violating the First Amendment. State and federal laws currently regulating unfair competition often affect the advertising of otherwise legal products. *See, e.g.,* Federal Trade Commission Act of 1914, Pub. L. No. 106-170, 38 stat. 717 (codified as amended at 15 U.S.C. § 45); *see also* Mass. Gen. Laws ch. 93A, § 2(a). Yet these laws do not violate the First Amendment because the government has a substantial interest in preventing overreaching in the marketing of consumer products. Furthermore the government interest at stake is the interest in the fair transaction of commerce. Where the government seeks to regulate commercial speech in the marketplace the court applies an intermediate level of scrutiny where the government is regulating commercial concerns not political ones. *See 44 Liquormart*, 517 U.S. at 501.

The United States Supreme Court contemplates that speech may be lawful and nonmisleading, yet still may implicate substantial economic concern on the part of the state. *See Edenfield v. Fane*, 507 U.S. 761 (1993) (speech-restrictive statutes analyzed under third and fourth prongs of *Central Hudson* test even though speech was acknowledged to be truthful and nonmisleading). Representations by manufacturers of the health benefits of a consumer product are properly considered as part of the decision-making process of a consumer. Mass. Gen. Laws ch.93A, § 2(a). In the instant case, speech that may be nonmisleading for adults entices children to be

involved in breaking the law when purchasing tobacco products. *Consolidated Cigar*, 218 F.3d at 42-43.

The FTC found that the cigar industry has indeed engaged in deceptive and unfair practices and recently entered into consent decrees with seven cigar manufacturers requiring warning labels on cigar advertising and packages. *See In the Matter of Swisher Intntl, Inc.*, FTC File No. 002-3199 *republished at* <http//www.ftc.gov/os/2000/06/swisherconsent.htm> (visited on March 21, 2001). Also, the FTC found a "large spending increase in point of sale advertising" for cigars from 1996 to 1997. *See* FTC 1999 Cigar Report, *supra*, at 3. The FTC helped rebalance the bargaining positions of the tobacco industry and consumers by regulating advertising. The Attorney General's regulations do not violate the First Amendment because they are aimed at speech that is an unfair advertising practice in the context of communication to minors.

The regulations also meet the standard suggested by Justice Thomas in *44 Liquormart*, who stated that he would welcome a result that would not permit a state to "restrict advertising regarding commercial transactions except to the extent that it outlaws or otherwise directly restricts the same transactions within its own borders." *44 Liquormart*, 517 U.S. at 525 (Thomas, J. concurring); *see also United States v. Edge Broadcasting*, 509 U.S. 418, 433-34 (statute upheld where it regulated speech about an illegal activity). This is precisely the approach taken here. The Commonwealth has prohibited the sale of cigars to minors and the regulations at issue regulate tobacco advertising where minors are most likely to see the ads. Mass. Regs. Code tit. 940, §§ 21.04; 22.03; 22.06. The Attorney General's regulations only "restrict advertising regarding commercial transactions" as far as the state's prohibition extends. *44 Liquormart*, 517 U.S. at 525 (Thomas, J. concurring). Under this analysis, the Attorney General's regulations would withstand review because of their limited geographic scope related to where minors actually congregate. By contrast, the statute in *44 Liquormart* would still fall because the statute there completely banned speech to deprive adults of information throughout the jurisdiction. The Attorney General's regulations are consistent with First Amendment commercial speech values even under the stricter approaches suggested by *44 Liquormart*.

IV. THE REGULATION DIRECTLY AND MATERIALLY ADVANCES THE GOVERNMENT INTEREST AND IS NO MORE EXTENSIVE THAN NECESSARY TO PREVENT CHILDREN FROM BEING EXPOSED TO UNFAIR ADVERTISING PRACTICES

As the regulation is not a prohibition on commercial speech and it does relate to government interest in commercial transactions, it does not meet the criteria set out in *44 Liquormart* for heightened scrutiny. Therefore, the appropriate standard to apply is the *Central Hudson* test.

Commercial speech regulations must conform to the four-part commercial speech test set forth in *Central Hudson*, 447 U.S. 328. Constitutionally protected commercial speech may be regulated if the government furthers a substantial interest through a regulation that directly and materially advances that interest in a way that is no more extensive than necessary to achieve that interest. *Id.* at 566. Although the Attorney General, in regard to the first prong of the test, has not "concede[d] that the targeted advertising qualifies for protection, since it might be seen to induce illegal activity," *Lorillard Tobacco, Co. v. Reilly*, 84 F. Supp. 2d 180, 185-86 (D. Mass. 2000), he has done so for the purposes of summary judgment. *Consolidated Cigar*, 218 F.3d at 43.

The second prong, requiring that the regulation further a substantial state interest, is not at issue in this case as Petitioner cigar companies concede that preventing youth from acquiring tobacco products is a substantial state interest. *See* Br. Pet'r Altadis U.S.A., et al. at 8. The third and fourth prong of the *Central Hudson* test regarding whether the regulation directly and materially advances the government interest in protecting minors in a manner that is no more extensive than necessary are at issue in this case. *Consolidated Cigar*, 218 F.3d at 43.

A. The Government's Substantial Interest in Protecting Minors Under Consumer Protection Laws is Directly and Materially Advanced By the Regulation

The government regulation must directly and materially advance the government's interest. *44 Liquormart*, 517 U.S. at 505 (plurality). Social science research shows that minors are particularly susceptible to tobacco advertising and limiting the youth appeal of the advertising should directly affect the enticement of children to acquire tobacco through purchase or theft.

There is extensive social science research regarding the effect of tobacco advertising on the purchasing habits of teen smokers and on the positive imagery with which children regard and recognize tobacco advertising images. Researchers have demonstrated a strong link between tobacco promotion and the decision by adolescents to begin to smoke. J. Pierce, et al., *Tobacco Industry Promotion of Cigarettes and Adolescent Smoking*, 279 JAMA 511 (1998). After the introduction of the Joe Camel ad campaign in the late 1980s, the market share of Camel cigarettes in the teen market increased at least 20-fold, and the previous decline in teenage smoking was reversed. CDC, *Changes in the Cigarette Brand Preferences of Adolescent Smokers - United States, 1989-1993*, 43(32) MMWR 577-81 (1994). The rise in young girls' smoking habits after the tobacco industry decided to go after girls as a target market has also been documented. J. Pierce, et al., *Smoking Initiation by Adolescent Girls, 1944 Through 1988: An Association With Targeted Advertising*, 271 JAMA 608 (1994).

The Attorney General regulated cigar advertising as part of "a rational and well-founded comprehensive tobacco regulatory scheme" to prevent minors from being enticed to use tobacco products. *Consolidated Cigar*, 218 F.3d at 49. Every state has laws that prevent or discourage sales of tobacco products to minors. National Cancer Institute. *State and Local Legislative Action to Reduce Tobacco Use*. Smoking and Tobacco Control Monograph No. 11, U.S. Dept of Health and Human Services, Nat'l Inst. of Health, (August 2000). Yet, in Massachusetts, storefront advertising by the tobacco industry increases the closer a storefront is to a school. *See* Operation Storefront, *supra,* at 11. Cigar advertising makes up 11% of tobacco advertising at retail establishments. *See*

DiFranza, *supra*, at 323. Cigars are an important component of an overall tobacco product regulatory approach to prevent minors from purchasing or stealing tobacco products. Regulating cigarette advertising without regulating cigar advertising would allow the cigar industry to fill the cigarette advertising slots and to achieve the perverse result of driving minors from cigarettes to cigar use. *See id.* at 321.

This "filling the advertising gap" behavior by the cigar industry was documented and regulated by Congress in the Little Cigar Act of 1973. Little Cigar Act of 1973, Pub. L. No. 93-109, 87 Stat. 352 (1973) (codified as amended in scattered sections of 15 U.S.C.). Congress had passed the Federal Cigarette Labeling and Advertising Act stating that cigarettes could not be advertised over any electronic medium beginning on January 1, 1971. *See* FTC 1999 Cigar Report, *supra*, at 11-12. In the wake of this law, the cigar industry increased television advertising to such an extent that there was a 254% jump in consumption of little cigars from 1971 to 1972. *See id.* Congress subsequently regulated advertising of Little Cigars over electronic media. *See* Little Cigar Act of 1973 (codified at 15 U.S.C. § 1335). The Attorney General's comprehensive program to prevent targeting of youth reasonably restricts cigar advertising on storefronts for similar reasons, as Congress chose to regulate Little Cigars on television and radio.

The Court has applied a commonsense approach, recognizing that the purpose of advertising is to increase consumption of a product and that limited restrictions on advertising would have a concomitant effect on purchases of the product. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618 (1995). In contrast, the Court places a heavier burden on the government to show that an *outright prohibition* on speech is justified by a direct and material effect in achieving the government's interest. *44 Liquormart*, 517 U.S. at 501.

In the current case, the regulation is not a prohibition. The cigar company Petitioners may still advertise in newspapers and magazines and at the point of purchase within a store as long as the advertising is at least five feet above the ground and not visible from outside the store. Mass. Regs. Code tit. 940, § 22.06. The Court's concern regarding paternalistic total bans on speech, as in *44 Liquormart*, is not implicated here because of the more limited scope

of the regulation. *See 44* Liquormart, 517 U.S. at 501. By contrast, in *Florida Bar*, the Court upheld "a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers." *44 Liquormart*, 517 U.S. at 502 (plurality) (interpreting *Florida Bar*, 515 U.S. at 633-34). Therefore the proper test to apply is the one set forth in *Florida Bar* which allows a commonsense recognition that advertising tends to have an effect on consumer behavior. *Florida Bar*, 515 U.S. at 626. This commonsense approach would include recognition that youth are particularly vulnerable to being swayed by advertising. Petitioners would not pay huge fees to advertising companies to create media imagery if such imagery did not produce the desired results. *See Dunagin v. Oxford*, 718 F.2d 738, 749-50 (5th Cir. 1983).

The social science evidence is strong that tobacco industry advertising increases the likelihood of youth purchase and use of tobacco products. Additionally, a commonsense understanding of marketing techniques supports the conclusion that consumers, and particularly minors, are influenced to make commercial decisions based on advertising. The Attorney General's regulations directly and materially advance the government interest in preventing minors from being taken advantage of in commercial matters under a commonsense approach or the stricter tests for outright prohibitions.

B. The Regulation is Targeted to Areas Where Children Congregate and Therefore is No More Extensive Than Necessary To Achieve the Government Purpose of Protecting Children From Manipulative Advertising Schemes

The fourth prong of *Central Hudson* requires that the regulation be no more "extensive than necessary" to achieve its goal. *Central Hudson*, 447 U.S. at 566. Thus a government regulation of commercial speech need not be the least restrictive means available, but rather must achieve a reasonable fit between the government's goals and its means. *See 44 Liquormart*, 517 U.S. at 529 (O'Connor, J. concurring in the judgment). The State's regulation must indicate "a careful calculation of the costs and benefits associated with the burden imposed by its prohibition." *Id.* (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)). The

government need not present a solution that solves all problems at once and does not need to "make progress on every front before it can make progress on any front." *United States v. Edge Broadcasting, Co.*, 509 U.S. 418 (1993).

The only other Circuit to address this specific issue, the Fourth Circuit, also found that reasonable, partial limitations on outdoor tobacco advertising designed to protect children and not limit adult speech was within the bounds of the First Amendment. *Penn Advertising of Baltimore y. Mayor and City Council of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated* 518 U.S. 1030 (1996), *modified*, 101 F.3d 332 (4th Cir. 1996), *cert. denied.* 520 U.S. 1204 (1997). The Fourth Circuit Court of Appeals specifically held that a Baltimore ordinance was no more extensive than necessary because it only addressed areas where the advertising was more likely to be seen by minors. *See Anheuser-Busch v. Schmoke*, 63 F.3d 1305 (4th Cir. 1995) (companion case to *Penn Advertising* addressing Baltimore's regulation of billboard liquor advertisements).

The Court disfavors complete bans on speech that are aimed at adults for paternalistic reasons. *44 Liquormart*, 517 U.S. at 501. In the current case the regulation is aimed at regulating speech targeting children to prevent the Petitioners from taking commercial advantage. The regulation is no more extensive than necessary because it is targeted where children are most likely to congregate. Indeed, children are required by truancy laws to be in school and thus within the proximity of the locations regulated by the Attorney General. *See* Mass. Gen. Laws ch. 76, § 1.

The narrowly-tailored element of commercial speech analysis does not require that government employ the least restrictive means available, but rather that the government's regulation be a reasonable fit between the goal and the method chosen to achieve the goal. *44 Liquormart*, 517 U.S. at 529 (O'Connor, J. concurring in the judgment). Justice O'Connor points out, however that "[t]he availability of less burdensome alternatives to reach the stated goal signals that the fit between the legislature's ends and the means chosen to accomplish those ends may be too imprecise to withstand First amendment scrutiny." *Id.*

Other alternatives proposed in *44 Liquormart* and Petitioner's brief, such as better education, higher taxes, and licensing retailers that sell tobacco products have been tried and are in place without

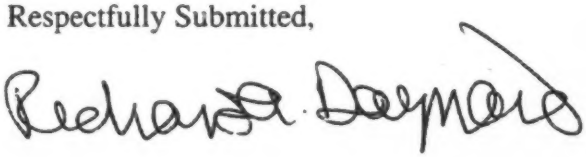
solving the problem. *See* discussion, *supra*, Part II. B. (discussing recommendations of The Surgeon General of the United States and Massachusetts programs in accord with those recommendations).

The Massachusetts Regulations Title 940, Chapter Sections 22.06(5)(a)&(b) and 22.06(2)(c)&(d), which directly and materially furthers the substantial state interest in protecting minors from commercial manipulation, is no more extensive than necessary by focusing on only areas where children congregate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the First Circuit should be affirmed.

Respectfully Submitted,



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